The Heritage Foundation Issue Bulletin

No. 181

The Heritage Foundation • 214 Massachusetts Avenue N.E. Washington, D.C. 20002 (202) 546-4400

July 19, 1993

UPSETTING THE BALANCE OF U.S. LABOR LAW: THE STRIKER REPLACEMENT BILL (S. 55, H.R. 5)

By Peter J. Ferrara
Senior Fellow

INTRODUCTION

For over fifty years, U.S. labor law has allowed employers to hire replacement workers during a strike on the same terms as last offered to the strikers, including permanent employment. But legislation recently passed by the House (H.R. 5), and now pending in the Senate (S. 55), would prohibit employers from offering replacement workers permanent jobs on these same terms, and would require employers to fire any replacement workers whenever the strikers chose to return.

This proposed legislation goes to the heart of American labor law. The right to offer permanent jobs to replacement workers on the same terms as offered to the strikers subjects the bargaining positions of both the union and the employer to a crucial market test. If the union is demanding a market compensation package, while the employer is insisting on below-market compensation, then the employer will be unable to attract a sufficient supply of qualified, permanent replacement workers to maintain operations during a strike. But if the union is demanding excessive, above-market compensation, then the union will be unable to maintain an effective strike. The employer in this case would be able to attract a new, fully qualified work force at the offered market wage to replace the strikers if they do not return.

The proposed legislation, however, would shift this delicate balance firmly in favor of the union by exempting the union from this market test. It would establish instead a classic, special interest, legal monopoly in the labor provided by unions. Employers no longer would be able to respond to union demands for above-market wages by hiring other workers at the market wage for the company's regular, permanent work. Rather, the law would shield the union from the labor market competition of other workers. As a result, the union would be able to maintain an effective strike and possibly shut down the employer until he agreed to above-market compensation.

Note: Nothing written here is to be construed as necessarily reflecting the views of The Heritage Foundation or as an attempt to aid or hinder the passage of any bill before Congress.

Granting this special interest legal protection to unions would infringe the rights of other Americans. Specifically:

Workers would be prohibited from accepting the permanent work at market wages that the strikers had rejected, and have to accept other work with lower wages than they would have received if permitted to compete in a completely open labor market.

Workers who did not want to join the strike, or who were not part of the striking bargaining unit, or who were employed by related businesses dependent on an employer being struck, would be thrown out of work whenever unions chose to use their new monopoly power to shut down an employer.

Workers for non-unionized employers effectively would lose their right to choose not to be represented by a union, or to vote on such representation in a secret ballot election, as even non-union employers would be prohibited from hiring permanent replacements for striking workers demanding union recognition. Where strikers were able to shut down an employer, the employer would have no choice but to recognize the union, even when a majority of workers actually did not want such representation.

Consumers would be denied the goods or services of employers subject to a strike.

Employers could face shutdown by a group of workers unless they accepted excessive above-market union demands.

Unionized labor ultimately would lose as well, since employers cannot compete for long in the market if they pay above-market wages. Consequently, union jobs will be lost until their compensation is brought into line with the market. Along the way, however, many employers and other workers also will be brought down, resulting in job losses and slower economic growth.

Studies show that current law is working quite well. While the right to hire permanent replacements performs its function of subjecting unions as well as employers to market discipline, permanent replacements actually are hired in only about 17 percent of strikes, and replace only about 3 percent to 4 percent of all strikers each year.[1] Moreover, most of the replaced strikers eventually are rehired, leaving only about 1 percent of strikers permanently replaced. Even these workers tend to find alternative permanent work while waiting to be rehired.

1 General Accounting Office, Report to Congressional Requesters: "Strikes and the Use of Permanent Strike Replacements in the 1970s and 1980s," GAO/HRD-91-2 (1991); The Bureau of National Affairs, Inc. ("BNA"), "Replacement Workers: Evidence from the Popular and Labor Press: 1989 and 1990" (March 1991); Daily Lab. Rep. (BNA) no. 75 of E-1 (April 17, 1992).

Americans are wary of excessive union power. They are particularly concerned about altering the balance in existing law by granting unions the power to prevent other workers from accepting employment at a fair market wage, or to impose a strike to win more than fair market compensation. Ever since the 1930s, Congress has maintained an appropriate balance. Lawmakers today would be unwise to change it.

How Current Law Works

Current labor law, specified primarily by the National Labor Relations Act (NLRA), enacted in 1935, is based on the principle that workers should have the choice of whether or not to accept available work, join a union, join a strike, or engage in other collective bargaining activities. This freedom of choice is protected from infringement by the union as well as by the employer. Thus the law never has tried to shield workers from the operation of supply and demand in the open market, or to enable workers to obtain more than the fair market value of their labor, based on worker productivity.

These general principles lead to specific rights and restrictions. Among them:

1) **A union is required to obtain the consent of a majority of workers in a collective bargaining unit before it can represent them.**

This consent must be obtained through a secret ballot election, or by signed consent cards from a majority of workers and voluntary recognition by the employer. Moreover, even after a union is certified through this process, individual workers in the bargaining unit remain free to choose not to join the union, though any union agreement with the employer will cover them and they must pay a portion of regular union dues to cover collective bargaining expenses.

2) **An employer is prohibited from firing, disciplining, or disadvantaging a worker for any union activities, even before a union is recognized for a bargaining unit.**

A worker may seek to organize a union, vote for the union, and participate in union affairs free of any such sanctions. Employers are strictly limited and regulated regarding what they may do or even say in response to a union organizing campaign, or during a secret ballot election, to avoid undue interference. Once a union is recognized, moreover, the employer is required to negotiate with the union in good faith, and to seek to come to agreement if economically possible.

3) **Workers are free as well not to join a strike called by the union.**

Employees may choose to cross the picket lines and report to work. Critically, however, if the worker does decide to join the strike, the employer is prohibited by law from firing, disciplining, or disadvantaging him for doing so.

4) **In the event of a strike, the employer has the right to try to continue operating the business.**

This naturally means that the employer has the right to try to hire the labor necessary to continue operations. But the employer can offer these new workers no more than he last offered the strikers. If the strike is an "economic" strike, which

is defined by law to mean where the dispute is solely over compensation, working conditions, and other terms of employment, the employer is not required by law to fire the replacement workers if the strikers decide to come back to work after the new workers are hired. These strikers, then, cannot regain their old jobs if they are filled by the new workers.

This right to hire permanent replacements was recognized by the Supreme Court in *NLRB v. Mackay Radio and Telegraph Co.* (304 U.S. 333), decided in 1938. The unanimous decision was in fact a straightforward application of the NLRA, which did not anywhere prohibit permanent replacements, and therefore left employers with their common law right to hire permanent employees as they choose.

The employer, however, is required to hire any returning strikers whose jobs were not filled by permanent replacements hired during the strike. Workers also retain the right to be rehired for any suitable openings the employer may have at the end of the strike, or which may come open afterwards. Moreover, if the strike is an unfair labor practice strike, which is defined by law to mean where the employer has committed violations of the labor laws leading to or prolonging the strike, then the employer must rehire all the strikers, discharging any new hires to the extent necessary. In this case, the employer must also pay the strikers back wages for the entire period of the strike, in addition to whatever the employer may have paid the replacements during the strike.

Even where some or all of the strikers are permanently replaced, the union remains the collective bargaining agent for all of the workers, the replacements as well as the strikers. The employer consequently remains under the obligation to bargain in good faith and come to an agreement with the union if possible. Such agreements may, and quite frequently do, require the employer to rehire all of the strikers, leaving him to discharge the replacements to the extent necessary. This continuing obligation to bargain can be eliminated only through an election to decertify the union, where the strikers have a right to vote, as do the replacements, for up to one year after the strike.

The Crucial Market Test

The right to hire replacements for striking workers on the same basis as offered to the strikers, including permanent employment, is crucial to maintaining the economic soundness and fairness of U.S. labor law. This is because the right subjects both the employer and the union to a crucial market test in the event of a strike over economic issues.

Under current law, this market test works as follows. If the union is "right," in that the employer is not offering fair market compensation, then the employer will not be able to attract sufficient, qualified replacement workers to maintain operations. In other words, if the employer is offering a below-market wage, the firm will not be able to attract a sufficient supply of qualified labor to meet its labor demand.

However, if the union is "wrong," in that the employer is offering a fair market wage while the union is demanding above-market compensation, then the employer will be able to attract sufficient, qualified replacement workers to keep the

business operating. In other words, only by offering the fair market wage where supply equals demand can the employer attract enough qualified workers to replace the strikers. If enough qualified workers are willing to work on the terms offered by the employer to fill all of the employer's available positions, then the striking union in rejecting these terms is demanding an above-market wage that is not economically viable for the employer—or the workers—over the long run.

An example of how this market test disciplines employers as well as unions was provided during congressional testimony on the proposed legislation by Captain Henry Duffy, president of the Air Line Pilots Association (ALPA). Duffy described the attempt and failure by United Airlines to hire permanent replacements for striking pilots in 1985, explaining:

> [The employer] demanded B-scale wages, insisting that ALPA accept the demand "or else."... As you may recall, ALPA did not yield, and the result was a bitter five week strike in which United sought to permanently replace the striking pilots. The company had even pre-trained 570 such replacements. Ultimately, these 570, risking their own careers, refused to cross ALPA's picket lines, and the company could not find enough qualified pilots to carry out their plan.[2]

Consequently, with the right to hire replacements on the same terms as offered to the strikers, U.S. labor laws leave both the union and the employer subject to market discipline. The union is constrained from demanding above-market wages because it fears that permanent replacements will be hired at the market wage. And the employer is constrained from insisting on below-market wages because then the employer will remain subject to an effective strike and shut down until he agrees to pay market wages. As a result, the entire system is steered toward the payment of fair market wages, which reflect the economic realities of supply and demand and the productivity of workers. These are consequently the only sustainable wage levels over the long run. This is why current law is the correct balance for the nation's labor laws.

This crucial market test arising out of current law has been recognized by, among others, Harvard Law School Professor David Westfall, who writes:

> The *Mackay* doctrine allows each side to a bargaining dispute, in effect, to "test the market" by seeking and using alternative sources of labor and employment, respectively.

---

2 *Preventing Replacement of Economic Strikers*: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 101st Congress, 2nd Session (1990), p. 72. Because United Airlines failed to offer fair market compensation, it was unable to find sufficient, qualified, permanent replacements, even though it tried. See also Daniel V. Yager, *Loading the Scales: Is the Balance Between the Right to Strike and the Right to Operate in Need of Reform?* (Washington, D.C.: Employment Policy Foundation, 1993), p. 61.

> Without such a test, employees would be free to strike repeatedly, no matter how excessive their demands were in relation to market wage rates, knowing that their jobs would always be waiting for them unless and until their employer was forced to eliminate their jobs altogether.[3]

The Caterpillar Example

The sound operation of current law is well illustrated by a major labor controversy in late 1991 and early 1992 at Caterpillar, a leading manufacturer of trucks and tractors. Caterpillar competes in a global market. While three-fourths of its manufacturing capacity is in the U.S., about 60 percent of its sales are outside the U.S., helping to reduce the total U.S. trade deficit by over $2 billion each year. All of Caterpillar's major competitors are foreign companies.

In November 1991, the United Auto Workers (UAW) struck Caterpillar. The company had offered a three-year contract with substantial wage increases, ultimately raising the average salary of its workers to $42,000 per year. In addition, employees were offered a substantial health care package, and pensions averaging $1,800 per month. The workers also were each guaranteed their compensation for six years even if they were laid off and found another job.

But the union rejected the offer. The reason was that the union had long followed the practice of "pattern bargaining." Under that practice, the UAW seeks a deal with a weak vehicle manufacturing company, and then demands the same deal from other manufacturers one at a time, including the Big Three auto makers. In the case of Caterpillar, the UAW demanded the same deal it had just completed with John Deere Co., another truck and tractor manufacturer. After Caterpillar, the UAW planned to impose the same deal on General Motors, Ford, and Chrysler, each in turn.

But since Caterpillar competes primarily overseas, it could not agree to the same deal as manufacturers who compete primarily in the domestic market. Indeed, John Deere and Harnishfeger, another vehicle manufacturer, avoided some of the burden of the UAW agreement by shifting much of their production overseas. Two other manufacturers, International Harvester and Allis-Chalmers, were driven into bankruptcy trying to keep up with the UAW pattern.

The strike at Caterpillar dragged on for five months. Finally, on April 6, 1992, Caterpillar began the process of resuming operations by hiring permanent replacements. On April 14, the union agreed to return to work at the company's last offer, subject to further negotiations. The right to hire permanent replacements had led the union to back down from unreasonable, ultimately counterproductive, above-market demands, and accept a market wage.

---

3 David Westfall, "Striker Replacements and Employer Freedom of Choice," 7 LAB. LAW. 137, 146 (1991).

How the Proposed Legislation Would Change Current Law

Companion bills introduced in the Senate (S. 55) by Senator Howard Metzenbaum, the Ohio Democrat, and in the House (H.R. 5) by Representative William Clay, the Missouri Democrat, would eliminate the legal right of employers to hire replacement workers for permanent employment during a strike on the same terms offered to strikers. The bill would require employers to fire any new workers hired during a strike whenever the strikers decided to come back to work.

This prohibition on hiring permanent replacements would apply to non-union employers where a union was seeking recognition and claimed written authorization from a majority of workers supporting the union. Consequently, a portion of a non-union employer's workers could strike to demand recognition of a union and they could not be permanently replaced during the strike to allow the employer to continue to operate. The prohibition also would apply in the case of illegal strikes, such as a strike against a second employer to enforce a boycott of a first employer who was being struck (secondary boycott), or a strike in violation of a no-strike clause in an existing collective bargaining agreement.

This legislation recently passed the House and is pending in the Senate.

Why the Legislation Would be Bad Law

Reason #1: The bill is special interest legislation.

Current law balances the competing interests in a strike. But the Metzenbaum-Clay bill would tilt the law firmly in the direction of unions. It would prohibit an employer from giving the job of a union employee to anyone else on a permanent, regular basis, when the union employee rejected terms another worker was willing to accept. It would require the employer instead to return the job to the union employee whenever the employee decided to reclaim it.

This legally sanctioned monopoly would have the same damaging effect as all other monopolies. It would destroy the crucial market test underlying America's labor laws, since employers would not be allowed to respond to union demands for above-market compensation by hiring other workers on a regular, permanent basis at the market wage. Instead, the law would shield union workers demanding above-market wages from the market competition offered by other workers. As a result, the union would be able to maintain an effective strike and could ultimately shut down the employer unless he agreed to pay more than fair market compensation for the union's labor. As Daniel Yager, an attorney and analyst for the Washington-based Labor Policy Association, has written:

> Indeed, the argument in favor of prohibiting [permanent] strike replacements must ultimately be based upon the premise that organized workers should be free to set a price for their labor without any regard for the market laws of supply and demand. For to take away the employer's right to hire [permanent] replacements would effectively give

> unions monopolistic power over jobs. No matter how many people were available and willing to provide the skills and labor an employer required at a price the employer was willing to pay, the union could demand a higher price and could strike as long as it saw fit, secure in the knowledge that the employer could never have a stable work force unless it ultimately capitulated to the union's demands.[4]

For these same reasons, a scholar for the Brookings Institution called the proposed striker replacement bills "classic, special interest legislation."[5]

Reason #2: The bill violates the rights of all workers.

While granting a special interest legal preference to unions, the proposed legislation would trample on the rights of workers in general. For instance, the legislation effectively would require employers to fire new workers, who had accepted employment on the same terms offered to the strikers, whenever the strikers chose to return to their jobs. It would deny these workers available work at market wages when others had rejected those wages. As a result, the potential replacement workers would have to accept lower wages than they could get if they were allowed to compete in a fully open market.

In addition, those workers at a shut-down company who chose not to join the strike and wanted to continue working on the terms offered by the employer would lose their opportunity to work. Other workers of a shut-down employer who did not belong to the collective bargaining unit on strike also would be thrown out of work for the period of the strike as well. In New York, for example, department stores are required to employ a certain number of building engineers, depending on size, to remain open. If the small number of required engineers were to strike, and if the store is prohibited from attracting sufficient replacements because it cannot offer permanent work, then all the employees of that store would be forced out of work for the duration of the engineers' strike.

Workers for suppliers of shut-down employers, or of companies unable to operate without the products of a shut-down employer, or other companies dependent on the continued operation of a major employer, would lose their work and income as well for as long as the union chose to continue the strike, if permanent replacements could not be hired. Striking employees of a small contractor at a construction site, for example, could shut down the entire site, throwing thousands of workers out of work for as long as they chose to strike.

Reason #3: The bill would hurt the general public.

Current law protects the general public from losing the services of a business that has been struck. Many services, such as the operation of hospitals or power

4 Yager, *op. cit.*, p. 67.
5 As quoted in Yager, *op. cit.*, p. ii.

plants, and the production and distribution of gasoline and heating oil, are essential to the public health and to the livelihoods of communities. The ability of employers to continue such operations by hiring permanent replacements is of critical importance to the public.

Reason #4: The bill threatens non-union workplaces.

Under the proposed legislation, non-union employers and workers would be subject to intimidation by unions.

Current law protects the rights of workers to choose not to unionize or to vote in a secret ballot election before they unionize. Under the proposed legislation, non-union employers would be prohibited from offering permanent jobs during a strike where the union had obtained signed consent cards indicating union support from a majority of workers. The problem is that such signed consent cards can be and often are obtained by publicly pressuring workers who would not otherwise support the union. That is precisely why current law provides for secret ballot elections. But once signed consent cards were obtained, a strike by a minority of workers demanding employer recognition of the union could be sufficient to shut the company down if the employer were prohibited from offering permanent, regular work to replacements. The employer then would have little choice but to recognize the union, even if a majority of the workers did not actually support it. These workers consequently would lose the right they would otherwise have to a secret ballot election on representation by the union, and ultimately their right to choose not to be represented by the union.

Reason #5: The bill undermines the valid rights of employers.

The proposed legislation would diminish the rights of employers to continue to operate their businesses. By depriving employers of the ability to attract new workers with permanent regular employment, the legislation would grant unions much greater power to shut down many employers. As a result, many employers would be forced to accept excessive, above-market union demands.

If an employer offers a market wage that attracts enough qualified workers to enable the employer to maintain his operations successfully, then there is every reason why the employer should be allowed to hire the workers and continue to operate. The fact that the employer had employed workers who refused to continue at such market wages does not provide a reasonable basis for preventing the workers who want to accept the work on such terms from doing so.

Reason #6: The bill would destroy jobs and slow economic growth.

The great irony of this legislation is that ultimately it will cause even union labor to lose out. The simple fact is that employers cannot compete in the market over the long run while paying more than market wages reflecting the productivity of their workers. If unions in the U.S. can impose above-market compensation because of special legal benefits, then many employers will shift jobs to overseas locations or reduce their total work force. The survival of these union employers—and union jobs—ultimately will be threatened. As a result, union jobs will be lost until compensation is brought back into line with the market. In the process, re-

lated companies and their workers will be negatively affected as well. Ultimately, national economic performance will suffer, resulting in slower economic growth.

FAULTY ARGUMENTS MADE IN SUPPORT OF THE LEGISLATION

Faulty Argument #1: Employers can hire temporary replacements.

Advocates of the proposed permanent replacement ban argue that struck employers could always keep operating simply by hiring temporary workers to replace the strikers until they returned, without offering the replacements permanent employment.[6] But this is unlikely to be a serious option for reliable sustained operations for most businesses.

Such temporary positions would be unappealing to potential employees because the period of employment would be very uncertain, and possibly quite short. The strikers could return in a day, or a week, or a month. Most strikes do not last longer than a few weeks or months. Workers available for such temporary and uncertain work are less likely to be skilled, productive, and reliable. For work that requires any sort of specialized or developed skills, finding temporary replacements in sufficient numbers to continue operations likely would prove impossible in most cases. Employers located in rural areas would have particular difficulties. And even if a temporary work force was assembled, the union could immediately come back to work until the temporary workers had dissipated, and then go back out on strike, disrupting the attempt to maintain operations with temporary replacements.

As a result, most employers effectively would be unable to continue with temporary workers. Advocates of the proposed legislation point to other possibilities for keeping the business operating, such as using management personnel or stockpiling in advance. But all these are at best stop-gap measures that could continue service only for a limited period. And for many employers these options would not be possible at all. For example, daily services such as retail operations, medical facilities, transportation, or newspapers cannot be stockpiled in advance. Also, many would not have enough sufficiently skilled management workers to keep the business running without the regular work force. With employers prohibited from hiring permanent replacements, therefore, unions in practice would be able to shut down many if not most employers.

Faulty Argument #2: The legislation will save the right to strike.

Advocates of the proposed legislation argue that if employers can hire replacements, then workers no longer would have true legal protection for the right to

---

6 *Workplace Fairness Act, Report together with Minority Views*, 102nd Congress, 1st Session, U.S. Senate, Report 102-111, July 18, 1991 ("Senate Report"), pp. 22-23, 28; *Workplace Fairness Act, Report together with Minority, Separate, Supplemental, and Additional Views*, 102nd Congress, 1st Session, U.S. House of Representatives, Report 102-57, Part 3, June 27, 1991 ("House Report"), pp. 28, 33.

strike, because workers would then be in no better position than if they could be fired outright for striking.[7] This argument is erroneous.

Under current law, workers cannot be fired simply for striking. They can lose their jobs to permanent replacements only if the market test shows that they were demanding above-market compensation, and the employer was offering fair-market compensation that would attract enough sufficiently skilled workers to fill all the available positions. Unions should not be legally shielded from this valid market competition, for all of the reasons discussed above. The Supreme Court has properly recognized this, ruling in 1965 that:

> The right to bargain collectively does not entail any "right" to insist on one's position free from the sort of economic disadvantage which frequently attends bargaining disputes.... The right to strike as commonly understood is the right to cease work—nothing more.[8]

In addition, current law provides several further protections for the right to strike, quite different from a legal framework in which workers simply could be fired for striking. If an employer has not hired a permanent replacement for a striking worker, for example, then he must fully restore the worker to his job at the end of the strike with no disadvantages. Replaced strikers also must be hired first for any new openings for which they are qualified. If the strike is found to be an unfair labor practice strike, where a labor law violation by the employer has caused or prolonged the strike, then even replaced strikers must be rehired for their old jobs, with back pay for the entire period of the strike.

Moreover, even where strikers are permanently replaced, the union remains the collective bargaining agent for the work force, including strikers as well as replacements. The law consequently continues to require the employer to bargain in good faith and come to an agreement with the union if possible. Through this process, most replaced strikers are in fact ultimately rehired under a completed agreement with the union.

Current law thus is far from the equivalent of a regime in which an employee can be legally fired for striking. Unions have conducted thousands upon thousands of strikes under this law since the employer's right to hire permanent replacements was explicitly recognized in 1938. In supporting a ban on permanent replacements, unions are asking for much more than protection of the right to strike. They are asking for the right to strike **and** be shielded from any market competition for their jobs, receiving a legal monopoly over the permanent, regular work available from their employers.

---

7 House Report, pp. 11-13, 23-25; Senate Report, pp. 3-6, 16-17.

8 *American Ship Building Company v. NLRB*, 380 U.S. 300, 310, 313 (1965).

Faulty Argument #3: Current law allows union busting.

Advocates of the proposed legislation maintain that allowing employers to hire permanent replacements enables them to engage in union busting. They contend that employers who want to dump their unions can simply make outrageous offers that the union could not possibly accept, forcing it to go out on strike. The employer can then hire permanent replacements and seek a decertification election, in which the new employees can vote out the union.[9]

Such a planned course of action, however, would clearly be an unfair labor practice under current law, as the employer would not be negotiating in good faith. Any convincing evidence that the employer was in fact pursuing such a course would lead to sanctions requiring the employer to rehire all the strikers and pay them back wages, in addition to whatever he paid the replacements. The National Labor Relations Board (NLRB) has not been reluctant to find unfair labor practices and impose sanctions where warranted. Indeed, the NLRB has found an unfair labor practice requiring reinstatement of the strikers in about 60 percent of the cases it has decided since 1935 involving the hiring of permanent replacements.[10] Advocates of the permanent replacement ban have not shown that the NLRB is failing to find union busting practices where they are attempted.

Another legal protection for the union is that replaced strikers are allowed to vote in any union decertification election, as can the permanent replacements, for a year after the strike. If there is any reason to believe that the one-year period is too short, Congress can always extend it.

But most important of all, the argument that permanent replacements can be used as part of a union-busting scheme is economically incoherent. The supposedly outrageous offer that the employer allegedly would use to force the union to strike is the same offer that the employer would have to use to hire the permanent replacements. If that offer is so outrageous that it could not possibly be accepted by the union, it hardly could serve as the basis for attracting a full, new, completely qualified work force.

The bottom line is that unions face no real threat as long as they only are seeking fair market compensation. An employer who insists on offering below-market wages will not be able to attract enough fully qualified workers to replace the union. The union can get into trouble only if it demands above-market compensation while the employer is offering a fair market wage. In that case, the problem is not the law, but the union's demands.

Advocates of the proposed legislation further contend that allowing employers to hire permanent replacements increases labor strife and bitterness and prolongs strikes, particularly since the hiring of replacements adds the issue of striker reinstatement to the bargaining.[11] But such labor strife will result whenever the union

---

9 House Report, pp. 25-28; Senate Report, pp. 10-22. See also Yager, *op. cit.*, pp. 24-25, 85-89.

10 Yager, *op. cit.*, pp. 110-122.

11 Senate Report, pp. 20-22; House Report, pp. 26-28. The advocates point to a recent study finding that strikes

demands above-market compensation rather than accepting an offered market wage, which is the only case where a fully qualified work force can be hired to replace strikers. The problem here again is not the law, but the union demands.

Moreover, contrary to the claims made by advocates of the legislation, the proposed prohibition on permanent replacements would produce increased labor strife and more and longer strikes. Employers would more vigorously resist any unionization in the first place, knowing that union recognition would grant a legal monopoly to the union over its permanent, regular employment. Unions also would call more and longer strikes, as they would be free of the current risk of permanent replacement possibly resulting from a strike. Unions, moreover, would be inclined to use their increased monopoly power to exact above-market compensation from the employer, naturally producing increased and more bitter labor battles as the employer resisted such demands. Significantly, a recent study of Canada, where some provinces ban permanent replacements and others do not, found an increased number of strikes, and more prolonged strikes, where permanent replacements were banned.[12]

Faulty Argument #4: Hiring permanent replacement workers is a new phenomenon.

Unions have operated in America for 55 years with employers having the right to hire permanent replacements for strikers. Why should a change be made now? Advocates of the proposed ban on replacements respond that permanent replacements were almost never hired before 1980, or that such hirings were "extremely rare," but the practice increased sharply after 1980, becoming an "increasingly common" or even "standard" practice.[13] The facts, however, do not support this argument.

---

lasted much longer when permanent replacements were hired than when they were not. Professor Cynthia Gramm, University of Alabama, "Empirical Evidence on Political Arguments Relating to Replacement Worker Legislation," Industrial Relations Research Association, Proceedings of the 1991 Spring Meeting, April 25-27, 1991. But that study says nothing about causation—that is, whether the permanent replacements caused the longer strikes or the longer, more bitter strikes caused the employer to resort to permanent replacements. More likely, the employers were compelled to resort to permanent replacements in the more bitter strikes that were going to last longer and create a greater need for replacements to keep the business functioning.

12 Morley Gunderson, "The Effects of Canadian Labour Relations on Strike Incidence and Duration," *Journal of Labor Economics*, Vol. 8, No. 3 (1991). Yager reports that even the Carter Administration concluded during consideration of labor law reform in 1977 that "the effect of prohibiting [permanent] replacements would be to increase strike activity, encourage striking union members to hold out longer until their bargaining demands were met, and tilt U.S. labor law in favor of labor." Yager, *op. cit.*, p. 22.

13 House Report, pp. 13-22; Senate Report, pp. 6-16; *Preventing Replacement of Economic Strikers*, Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, 101st Congress, 2nd Session (1990), p. 46 (Statement of Sen. Edward Kennedy); *H. R. 3936*, Hearings Before the Subcommittee on Labor-Management Relations of the House Committee on Education and Labor, 101st Congress, 2nd Session (1990) (Statement of Rep. William D. Clay).

These advocates offer no direct data documenting the extent to which permanent replacements were hired before 1980. Two reports cited by advocates of the proposed legislation provide only responses by a limited number of union officials and employers to questions regarding their opinions about the extent to which permanent replacements were hired before 1980, asking their opinions about practices ten and more years earlier. Another cited report studied management attitudes in 1980 in fifteen companies that had recently been struck but had not hired permanent replacements.[14]

Only one source of direct data has been found—past reported decisions of the NLRB. These reports show 229 cases from 1935 to 1980 in which permanent replacements were hired.[15] Over 95 percent of NLRB cases are settled before they are decided by the Board, so the base of 229 cases indicates far more instances of permanent replacement hiring. Moreover, about the same number of NLRB cases each year involving permanent replacements were decided after 1980 as before. There has been no increasing trend in the use of permanent replacements.

Other data establish that the hiring of permanent replacements was by no means a "common" or "standard" practice in the 1980s. A study by the General Accounting Office (GAO), requested by the proponents of the permanent replacement ban, found that in both 1985 and 1989 permanent replacements were hired in only about 17 percent of all strikes.[16] A later study by the Bureau of National Affairs (BNA) found that such replacements were hired in 17 percent of all strikes in 1989 and 1990 as well, and about 15 percent of strikes in 1992.[17] A study of a random sample of strikes from 1984 to 1988 by Professor Cynthia Gramm of the University of Alabama similarly found that permanent replacements were hired in 16 percent of the strikes studied.[18]

Even more significant, however, the GAO study found that permanent replacements were hired for only 4 percent of the total number of striking workers in 1985, and just 3 percent of striking workers in 1989. Even this greatly overstates the degree to which individual strikers were permanently replaced, since the GAO study did not examine whether the replaced strikers were later rehired. Most permanently replaced strikers are in fact later rehired by their old employers through one of three means:

1) **The employer reaches an agreement with the union providing for the rehiring of strikers;**

---

14 House Report, pp. 14-15, 17-19; Senate Report, pp. 7-8, 10-12. These sources provide no hard, direct data concerning the use of permanent replacements before 1980, nor any rigorous or reliable basis for drawing conclusions as to the extent such replacements were hired before 1980. They certainly do not establish that permanent replacements were almost never hired before 1980, or provide any contradiction of the NLRB data described below by showing that permanent replacements were hired during this period to some significant degree.

15 Yager, *op. cit.*, pp. 25-26, 109-118.

16 GAO, *op. cit.*

17 BNA, *op. cit.*

18 Gramm, *op. cit.*

2) **The NLRB finds an unfair labor practice requiring the strikers to be rehired;**

3) **The employer has new openings which the strikers have a legal right to claim first.**

The BNA study found that about 70 percent of workers who had been "permanently" replaced in strikes in 1990 and 1991 had been later rehired through one of these means.[19] Since permanent replacements are hired for only 3 percent to 4 percent of strikers to begin with, this means only about 1 percent of strikers ultimately lose their jobs through permanent replacement. Most likely, these workers find other permanent employment while waiting to be rehired by their old employers.

These data show that the policy of allowing permanent replacements is working quite well. It allows a market test to restrain excessive union demands, while leaving the employer subject to market discipline as well through the threat of a strike. Replacements actually are hired in only a small number of cases. And only about 1 percent of strikers ultimately lose their jobs to these replacements. Moreover, this 1 percent involves strikers who rejected a fair wage that other workers were willing to accept and that was sufficient to attract enough qualified workers to fill the employer's openings. And, again, even these workers most likely find other employment before they can be rehired.

Faulty Argument #5: Public opinion supports the legislation.

Advocates of banning permanent replacements point to a 1990 poll conducted by Penn & Schoen, a national polling firm, showing the public opposed granting companies the right to fire employees for striking by 65 percent to 26 percent.[20] But as noted above, current law already prohibits employers from firing workers for striking. More precise poll questions show that the public opposes legislation to prohibit permanent replacements for strikers.

Example: In a 1991 poll conducted by Penn & Schoen, Americans agreed by 63 percent to 25 percent that employers should be permitted to operate during a strike using replacement workers.[21] In the same poll, Americans also opposed firing the replacements at the end of the strike by 54 percent to 34 percent.

Example: A *Time*/CNN poll in April 1992 found that by 60 percent to 29 percent Americans would not "favor a federal law that would prohibit employers from hiring permanent replacements for striking workers."[22]

Other poll results indicate a general public concern over union power.

---

19 BNA, *op. cit.*

20 Yager, *op. cit.*, p. 125.

21 *Ibid.*, p. 126.

22 *Ibid.*

Example: The 1991 Penn & Schoen poll found that nearly three-fourths of all Americans believe unions have too much or just enough power.

Example: A 1990 *Time*/CNN poll found the same results on the same question.

Example: The 1991 Penn & Schoen poll also found that by 64 percent to 20 percent Americans oppose government doing more to protect unions. The same poll found that by an overwhelming 84 percent to 11 percent the public supports requiring a secret ballot before a union can strike. The poll also found that 54 percent of Americans would not favor having a union for their workplace, compared to 27 percent who would.

Public opinion, therefore, supports current policy on the question of allowing permanent replacements for strikers.

Faulty Argument #6: Only the U.S. and South Africa allow permanent replacements to be hired.

Advocates of the proposed legislation argue that most other countries prohibit permanent replacements, and so the United States should, too.[23] But the entire labor law framework in other countries generally is different from that of the U.S. For instance, other countries generally fail to follow America's fundamental policy of establishing a market basis for disciplining both union and employer demands, which produces market wages related to productivity and economic reality.

Moreover, other countries often have provisions in their labor laws that would appall U.S. unions.[24] These include:

- ✔ allowing broad judicial authority to impose injunctions against strikes;
- ✔ requiring a secret ballot vote by each bargaining unit before there can be a strike;
- ✔ prohibiting strikes that might "grievously wound" a company;
- ✔ allowing employees in the same work unit to chose different unions;
- ✔ allowing individual workers to make their own agreements superseding the union agreement;
- ✔ prohibiting strikes for other than specific economic goals;
- ✔ requiring that strikes be ended when intimidation or violence is used; and
- ✔ allowing strikes only where a union is already organized.

---

23 Senate Report, pp. 23-24; House Report, pp. 28-29. See also Yager, *op. cit.*, p. 161.

24 Yager, *op. cit.*, pp. 162-163.

It is unlikely that U.S. unions would accept the argument that any or all of these provisions should be adopted in the U.S. just because other countries have adopted them.

CONCLUSION

The proposed striker replacement bill would undermine the market basis of, and balance of interests in, the U.S. labor law framework. Because employers no longer could hire replacements during strikes on the same permanent terms as last offered to the unions, unions would be free to demand excessive, above-market compensation. The legislation would establish a special-interest legal monopoly in the labor provided by unions, exempting them from the competition of other workers. As a result, unions would find it much easier to shut down employers until they agreed to above-market compensation. At the same time, this new legal preference for unions would infringe the rights of workers, employers, and the general public.

Under current law, union demands are constrained by market discipline, yet only about 1 percent of strikers ultimately fail to get their old jobs back because of permanent replacements. And many of these workers find alternative, permanent work while awaiting rehiring. The law works well today. There is no reason to change it.

All Heritage Foundation papers are now available electronically to subscribers of "Town Hall," the conservative meeting place, and "Nexis," the on-line data retrieval service. For information about Town Hall services, please call 1-(800) 441-4142. On Nexis, The Heritage Foundation's Reports (HFRPTS) can be found in the OMNI, CURRNT, NWLTRS, and GVT group files of the NEXIS library and in the GOVT and OMNI group files of the GOVNWS library.